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May 12, 2003

Mr. Kenneth R. Payne
Chief, Marketing Programs Branch
Livestock and Seed Program
Agricultural Marketing Service
U.S. Department of Agriculture
STOP-0251
1400 Independence Avenue SW, Room 2638-S
Washington DC 20250-0251

Re: Docket No. LS-02-15: Comments on Proposed Rule for Pork
Promotion, Research, and Consumer Information Program:
Submission of Information

Dear Mr. Payne:

Farmers' Legal Action Group, Inc. (FLAG) submits these comments on behalf of the Campaign for Family Farms (CFF) concerning the Proposed Rule for Pork Promotion, Research, and Consumer Information Program: Submission of Information, published at 59 Federal Register 11,998 (March 13, 2003) (Proposed Rule).

The Campaign for Family Farms (CFF) is an association of family farm and community membership organizations including Iowa Citizens for Community Improvement (Iowa CCI), the Missouri Rural Crisis Center (MRCC), the Land Stewardship Project (LSP), the Illinois Stewardship Alliance (ISA), and Citizens Action Coalition of Indiana (CAC). CFF is one of the Appellees in the lawsuit in federal court that declared the Pork Promotion, Research, and Consumer Information Program and the Pork Promotion, Research, and Consumer Information Order (collectively, the Pork Checkoff) unconstitutional. See *Michigan Pork Producers v. Campaign for Family Farms*, 229 F.Supp.2d 772 (W.D. Mich. 2002), *appeal pending*, Nos. 02-2337, 02-2338 (6th Cir.).

FLAG is a nonprofit, public interest law center dedicated to the preservation of family farms. FLAG is counsel to CFF and the individual hog farmer Appellees in the lawsuit challenging the constitutionality of the Pork Checkoff.

The Proposed Rule and "Survey" Are Redundant and Unnecessary.

The Campaign for Family Farms opposes the Proposed Rule in its entirety, since it is a prelude to conducting a "survey of eligible producers and importers . . . to determine if they favor a referendum on the Pork Checkoff Program." 68 Fed. Reg. 11,996. The requisite number of eligible producers have already petitioned USDA to conduct a referendum. USDA held a referendum and producers voted to terminate the Pork Checkoff Program; USDA should honor that vote.

In May 1999, CFF submitted petitions to USDA so that the Secretary of Agriculture would order a referendum on the termination of the Pork Checkoff. Secretary Glickman ordered a referendum that was held in August and September 2000. 65 Fed. Reg. 43,498 (July 13, 2000)(codified at 7 C.F.R. pt. 1230, subpt. E). In January 2001, Secretary Glickman announced that a majority of hog farmers voting in the referendum had voted to terminate the Pork Checkoff. The referendum results were that 15,951 producers favored terminating the Pork Checkoff and 14,396 voted against termination. See *Michigan Pork Producers Ass'n v. Campaign for Family Farms*, 229 F.Supp.2d at 775. Given the results of the referendum, on January 11, 2001, Secretary Glickman ordered the termination of the Pork Checkoff.

The pork industry lobbying group, the National Pork Producers Council (NPPC), sued Secretary Glickman in January 2001 in federal court to prevent Secretary Glickman from terminating the Pork Checkoff. The survey for which the Proposed Rule is supposedly necessary is supposed to take place pursuant to a private deal that took place between Secretary Veneman and NPPC to settle NPPC's lawsuit. See 68 Fed. Reg. 11,996.

In February 2002, newly appointed Secretary Veneman decided not to honor the vote of the producers and overturned Secretary Glickman's order.

CFF's position is and always has been that the Secretary should honor the referendum that took place in August and September 2000. Conducting yet another survey is a waste of taxpayers' money (the settlement agreement between USDA and NPPC stipulates that no Pork Checkoff funds will be spent for the costs of the survey, see Settlement Agreement paragraph III.K.) and delays the inevitable termination of the Pork Checkoff. Meanwhile, independent hog producers, who are suffering because of continued low hog prices, must continue to pay Pork Checkoff assessments. For these reasons, CFF opposes the Proposed Rule altogether.

The Pork Checkoff Program Has Been Declared Unconstitutional.

On October 25, 2002, United States District Court Judge Richard Enslen ruled that the Pork Checkoff Program is unconstitutional and ordered that it be terminated in 30 days. *Michigan Pork Producers v. Campaign for Family Farms*, 229 F.Supp.2d at 792. USDA appealed and obtained a stay of Judge Enslen's decision pending appeal. The Sixth Circuit Court of Appeals heard oral arguments in the case on March 14, 2003, and a decision is expected soon.

There is growing momentum in the courts to rule that checkoff programs are unconstitutional and must be terminated. A federal judge in South Dakota ruled the Beef Checkoff program unconstitutional, and that decision is on appeal to the Eighth Circuit Court of Appeals. *Livestock Mktg. Ass'n v. USDA*, 207 F.Supp.2d 992 (D.S.D. 2002), *appeal pending*, Nos. 02-2769, 02-2832 (8th Cir.). Other courts around the country have ruled that similar state checkoff programs are unconstitutional. For example, a federal court in Washington ruled that the Washington state apple checkoff program is unconstitutional. *In Re Washington Apple Advertising Commission*, No. CS-01-0278-EFS (E.D. Wa. March 31, 2003), *available at* http://www.waed.uscourts.gov/hpcases/01-cs-278_3-31-03.pdf. The Ninth Circuit Court of Appeals also found the California state table grape checkoff unconstitutional. *Delano Farms v. California Table Grape Comm'n*, No. 00-16778, 318 F.3d 895 (9th Cir. Jan. 27, 2003). A state court in Florida similarly ruled that the Florida citrus checkoff program is unconstitutional. *Tampa Juice Services v. State of Florida*, No. 6C-6-00-3488 (Fla. Cir. Ct. March 31, 2003). Most recently, a federal court in Louisiana ruled that the Louisiana state alligator checkoff is unconstitutional. *Pelts & Skins, L.L.C. v. Jenkins*, No. 02-384-A, 2003 U.S. Dist. LEXIS 7014 (M.D. La. April 24, 2003).

USDA is spending taxpayer dollars to defend checkoffs in at least five federal courts. It should not waste additional taxpayer money in conducting a survey and duplicative referendum on a program that has been ruled to be unconstitutional.

At a Minimum, Consideration of the Proposed Rule Should Be Deferred Until After a Final Decision Is Issued on the Constitutionality of the Pork Checkoff Program.

It is likely that the United States Supreme Court will agree to hear one of the cases challenging mandatory checkoff programs, and will give a definitive pronouncement on whether or not they are unconstitutional. That decision probably will happen within the next two years. Conducting a survey of pork producers before the Supreme Court rules on the constitutionality of the Pork Checkoff is a needless waste of taxpayer money. If the Supreme Court rules that the Pork Checkoff is unconstitutional, the money spent on a survey will have been wasted. If the Supreme Court rules that the Pork Checkoff is constitutional and may continue, USDA is free to conduct its survey at that time. According to the terms of the settlement agreement between USDA and NPPC, the survey must take place "*no earlier than June 2003.*" 68 Fed. Reg. 11,996. There is, therefore, no compelling reason to spend taxpayer money rushing to conduct a survey before there is a definite ruling on whether or not the Pork Checkoff is even constitutional.

In these times of record budget deficits and scarce resources, it is improvident and inefficient for USDA to waste taxpayer money conducting a duplicative survey on an issue that may well be moot within a year or two. Any decision on the Proposed Rule and any subsequent survey should be deferred until after the appeals on the constitutional challenges to the Pork Checkoff are completed.

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The Proposed Rule Must Include Safeguards to Ensure the Privacy of Hog Farmers.

As drafted, the Proposed Rule does not adequately safeguard the privacy rights of hog farmers. The Pork Order currently requires that all information obtained pursuant to 7 CFR §§ 1230.80 and 1230.81 be kept confidential by all persons. The Proposed Rule would be codified at 7 CFR § 1230.121 and thus would not necessarily be covered by the confidentiality requirement of the Pork Order.

Without an explicit confidentiality requirement, the Proposed Rule might permit private persons or organizations to obtain information that would make any survey process vulnerable to abuse. NPPC previously attempted to obtain the names of all of the hog farmers who signed the petitions calling for a referendum back in 1998 and 1999. CFF had to go to the Eighth Circuit Court of Appeals to maintain the confidentiality of that information. The Eighth Circuit protected the privacy interests of those hog farmers and ordered USDA not to turn over that information to NPPC. See *Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (8th Cir. 2000).

Thus, if the Proposed Rule is implemented, it should either include an explicit confidentiality provision, or Section 1230.82 of the Pork Order should be amended to specifically include the new Section 1230.121 in its confidentiality provision.

In addition, the Proposed Rule as drafted states that the Secretary may request "any other information deemed necessary to identify persons from whom assessments were collected to the Department." This phrase is vague and overbroad and also could lend itself to inconsistent, overbroad, or invasive interpretations. The Proposed Rule should be clarified to specify precisely what information the Secretary may request to avoid unnecessarily trammeling on the privacy rights of hog farmers.

Thank you for your consideration of these comments.

Sincerely,

FARMERS' LEGAL ACTION GROUP, INC.

s/Susan E. Stokes

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